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STATE OF WASHINGTON
SNOHOMISH COUNTY SUPERIOR COURT

STATE OF WASHINGTON DEPARTMENT
OF ECOLOGY,

Plaintiff,

v.

HOUSING AUTHORITY OF THE CITY OF
EVERETT,

Defendant.

No.

PROSPECTIVE PURCHASER
CONSENT DECREE RE: FENCED
AREA, EVERETT SMELTER SITE,
EVERETT, WASHINGTON

PROSPECTIVE PURCHASER CONSENT DECREE RE: FENCED
AREA, EVERETT SMELTER SITE

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EXHIBITS

- EXHIBIT A. Legal Description of Asarco Property
- EXHIBIT B. Maps depicting the Everett Smelter Site and relevant portions thereof
- EXHIBIT C. Cleanup Action Plan (FCAP/FEIS)
- EXHIBIT D. Restrictive Covenant 1 and 2
- EXHIBIT E. Public Participation Plan
- EXHIBIT F. Proposed Schedule
- EXHIBIT G. Interim Action Report and Final Design Report
- EXHIBIT H. Letter from EHA to Ecology asserting Innocent Purchaser Defense
- EXHIBIT I. Letter from Ecology to City of Everett re: City's role in supporting EHA's
property purchase

I. INTRODUCTION

A. This prospective purchaser consent decree ("Decree") is made and entered into by and between the Washington State Department of Ecology ("Ecology") and the Housing Authority of the City of Everett ("EHA").

B. The purpose of this Decree is to (1) resolve the potential liability of EHA for contamination of soil, groundwater and surface water at the Everett Smelter Site (Site) arising from releases or threatened releases of hazardous substances associated with the historic operation of the Everett Smelter; (2) to promote the public interest by providing for remedial action at one portion of the Site known as the "Fenced Area"; and (3) to facilitate the cleanup and redevelopment of contaminated residential land in Everett, Washington, within the "Fenced Area." The Fenced Area includes both streets and other public rights of way (the "Public Property"), and 22 vacant residential-zoned tracts of real property (the "Asarco Property"). A legal description of the Asarco Property is attached as Exhibit A. Maps of the Site that depict the extent of the Site plus relevant portions of the Site such as the Fenced Area, are attached as Exhibit B.

C. EHA is entering into a Purchase and Sale Agreement (the "Agreement") to purchase the Asarco Property from Domestic Realty Company, a wholly-owned subsidiary of ASARCO Incorporated, a New Jersey Corporation ("Asarco"), current owner of the Asarco Property. EHA anticipates that it will also seek vacation of some or all of the Public Property, and will hold title to the Public Property until new streets are created and dedicated to the City of Everett.

D. EHA proposes to perform a partial cleanup of the Site, by completing clean up of one portion of the Site, the Fenced Area, and making the Fenced Area available for single family or other residential development, consistent with applicable City of Everett zoning provisions and comprehensive plan designations as those designations may be revised. EHA's proposed completion of cleanup for the Fenced Area will occur subsequent to remediation of

1 the Fenced Area by removal of all material with arsenic concentrations exceeding 3,000 mg/kg,
2 which will be performed by Asarco outside the terms of this Decree and which will serve as a
3 precondition of EHA's purchase of the Asarco Property.

4 E. In the absence of this Decree, at the time it acquires an interest in the Fenced
5 Area, EHA would incur potential liability under RCW 70.105D.040(1)(a) of the Model Toxics
6 Control Act ("MTCA") for performing remedial actions, or for paying remedial costs incurred
7 by Ecology, resulting from past releases or threatened releases of hazardous substances at the
8 Site.

9 F. Ecology has identified confirmed or suspected contamination in soil,
10 groundwater, and surface water at the Site. Ecology has assigned the Site an overall priority
11 ranking of 1 pursuant to MTCA.

12 G. Asarco has performed a Remedial Investigation and Feasibility Study ("RI/FS")
13 (1995) and other sampling efforts and studies, which confirmed that environmental media at the
14 upland area of the Site contain concentrations of hazardous substances above applicable MTCA
15 cleanup levels, and which characterized the upland area of the Site adequately for cleanup
16 activities. The upland area of the Site includes the Fenced Area.

17 H. Ecology has approved an Integrated Final Cleanup Action Plan (1999), as
18 amended (2002) ("FCAP/FEIS"), attached to this Decree as Exhibit C. Ecology has also
19 approved an Interim Action Report and Final Design Report, both attached as Exhibit G. These
20 documents provide for (1) removal of all material from the Fenced Area in excess of 3,000
21 mg/kg of arsenic, followed by (2) removal of all material from the Fenced Area between 150
22 and 3,000 mg/kg of arsenic and the placement of ~~two~~ a minimum of two feet of clean fill, and
23 (3) compliance monitoring activities. As described in Section V (Statement of Facts), a
24 subsequent enforcement order issued to Asarco (Enforcement Order No. 02TCPNR-4059) and
25 an Agreed Judgment enforcing that order (Agreed Judgment Granting Relief to Enforce Order
26 Pursuant to RCW 70.105D.050, Snohomish Cty. Sup. Ct. No. 03-2-08502-1, October 20, 2003)

1 (“Agreed Judgment”), require partial implementation of FCAP/FEIS provisions. The
2 application of MTCA cleanup and remediation levels as indicated in the FCAP/FEIS is
3 appropriate under MTCA for single family or other residential redevelopment of the Fenced
4 Area, the portion of the Site that is the subject of this Decree (as a result of the 2002 amendment
5 of the FCAP/FEIS, the Restrictive Covenant(s) to be applied to property in the Fenced Area
6 need not prohibit single family residential use).

7 I. This Decree promotes the public interest by expediting cleanup activities at the
8 Site and by facilitating the redevelopment and reuse of a portion of the Site (the Fenced Area)
9 for single family or residential and/or related uses consistent with applicable zoning and
10 comprehensive plan designations as those designations may be revised.

11 J. EHA has offered to further certain Ecology goals as provided in this Decree, in
12 exchange for a covenant not to sue and protection from contribution under MTCA. Among
13 other things, subsequent to purchasing the Asarco Property, EHA will complete cleanup of the
14 the Fenced Area as specified in the FCAP/FEIS. EHA will not be responsible under the terms
15 of this Decree for conducting remedial actions at the Site outside the Fenced Area which the
16 FCAP/FEIS and associated cleanup documents would otherwise require be done outside the
17 Fenced Area, including but not limited to the required monitoring of ground water and surface
18 water outside the Fenced Area.-

19 K. Plans for the redevelopment of the Fenced Area are not likely to aggravate or
20 contribute to contamination at the Site, interfere with remedial actions that may be needed on
21 the Site, or increase human health risks to persons at or in the vicinity of the Site.

22 L. This Decree will provide a substantial public benefit by promoting the cleanup,
23 redevelopment, and active reuse of contaminated and partially vacant urban residential property
24 and providing affordable housing and substantial community and economic benefits to the area.

25 M. The Complaint in this action is being filed simultaneously with this Decree. An
26 answer has not been filed, and there has not been a trial on any issue of fact or law in this case.

1 However, the Parties wish to resolve the issues raised by Ecology's Complaint. In addition, the
2 Parties agree that settlement of these matters without litigation is reasonable and in the public
3 interest and that entry of this Decree is the most appropriate means of resolving these matters.

4 N. By entering into this Decree, the Parties do not intend to discharge nonsettling
5 parties from any liability they may have with respect to matters alleged in the Complaint. The
6 Parties retain the right to seek reimbursement, in whole or in part, from any liable persons for
7 sums expended under this Decree.

8 O. This Decree shall not be construed as proof of EHA liability or responsibility for
9 any releases of hazardous substances or cost for remedial action nor an admission of any facts;
10 provided, however, that EHA shall not challenge the jurisdiction of Ecology in any proceeding
11 to enforce this Decree.

12 P. The Court is fully advised of the reasons for entry of this Decree, and good cause
13 having been shown:

14 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

15 II. JURISDICTION

16 A. This Court has jurisdiction over the subject matter and over the Parties pursuant
17 to MTCA, Chapter 70.105D RCW. Venue is proper in Snohomish County pursuant to RCW
18 70.105D.050(5)(b).

19 B. Authority is conferred upon the Washington State Attorney General by RCW
20 70.105D.040(4)(a) and 70.105D.040(5) to agree to a settlement with any potentially liable
21 person ("PLP") if, after public notice and any required hearing, Ecology finds the proposed
22 settlement would lead to a more expeditious cleanup of hazardous substances. In addition, the
23 Attorney General may agree to a settlement with a person not currently liable for remedial
24 action at a facility who proposes to purchase, redevelop, or reuse the facility, provided that the
25 settlement will yield substantial new resources to facilitate cleanup, the settlement will expedite
26 remedial action consistent with the rules adopted under MTCA, and Ecology determines based

1 upon available information that the redevelopment or reuse of the facility is not likely to
2 contribute to the existing release or threatened release, interfere with remedial actions that may
3 be needed at the site, or increase health risks to persons at or in the vicinity of the site. RCW
4 70.105D.040(4)(b) requires that such a settlement be entered as a consent decree issued by a
5 court of competent jurisdiction.

6 C. Ecology has determined that a release or threatened release of hazardous
7 substances has occurred at the Site.

8 D. EHA currently owns a number of properties that are located within the Site's
9 boundaries, as outlined in Exhibit H to this Decree. Given the unique circumstances and all
10 information presented by EHA to Ecology in Exhibit H, however, Ecology has determined
11 under RCW 70.105D.040(3)(b) that EHA innocently purchased such properties and is not
12 currently liable for the Site under RCW 70.105D.040(1)(a) by virtue of owning such properties.
13 EHA certifies that it does not currently own any other interest in the Site, except as
14 contemplated by paragraph E of this Section, below.

15 E. EHA and Asarco are negotiating a Purchase and Sale Agreement for a separate
16 portion of property at the Site, the Asarco Houses. At the time EHA acquires an interest in the
17 Fenced Area, EHA will have previously acquired the Asarco Houses and settled through a
18 separate Prospective Purchaser Consent Decree (the "Asarco Houses Consent Decree") the
19 liability for the Site that would otherwise be incurred at the time it acquires the Asarco Houses.

20 F. Ecology has not determined that EHA is a PLP for the Site, and EHA has
21 certified under Section XII (Certification) that it is not otherwise currently liable with respect to
22 the Site under Chapter 70.105D RCW, and pursuant to paragraphs D and E of this Section.

23 G. Were EHA to acquire any interest in property at the Site in addition to the
24 separate interests owned by EHA and as described in paragraphs D and E of this Section, it
25 could become a PLP as an owner or operator under RCW 70.105D.040(1)(a). This Decree is
26 entered prior to EHA acquisition of any interest in the Fenced Area in order to resolve EHA's

1 liability for the Site that would otherwise be incurred through EHA's acquisition of an interest
2 in the Fenced Area, and to facilitate a more expeditious cleanup at the Site than otherwise would
3 occur. This Decree is entered pursuant to the authority set forth in RCW 70.105D.040(5).

4 H. This Decree has been subject to public notice and comment.

5 I. This Decree will yield substantial new resources to facilitate cleanup, and will
6 expedite remedial action consistent with Chapter 173-340 WAC. Based on available
7 information, Ecology has determined that the redevelopment or reuse of the facility will provide
8 a substantial public benefit and is not likely to contribute to the existing release or threatened
9 release, interfere with remedial actions that may be needed at the Site, or increase health risks to
10 persons at or in the vicinity of the Site.

11 III. PARTIES BOUND

12 This Decree shall apply to and be binding upon the Parties to this Decree, their
13 successors and assigns. The undersigned representative of each party hereby certifies that he or
14 she is fully authorized to enter into this Decree and to execute and legally bind such party to
15 comply with the Decree. EHA agrees to undertake all actions required by the terms and
16 conditions of this Decree and not to contest state jurisdiction regarding this Decree. No change
17 in ownership or corporate status shall alter EHA's responsibility under this Decree. EHA shall
18 provide a copy of this Decree to Asarco and all agents, contractors, and subcontractors retained
19 to perform work required by this Decree, and shall ensure that all work undertaken by such
20 agents, contractors, and subcontractors complies with this Decree.

21 IV. DEFINITIONS

22 Except as specified herein, all definitions in RCW 70.105D.020 and WAC 173-340-200
23 apply to the terms of this Decree.

24 "Asarco Houses" shall mean the 15 residential properties, lying outside of the Fenced
25 Area, with existing single-family and duplex houses, located north of Butler Street on
26 Hawthorne Street, Pilchuck Path and East Marine View Drive, as shown in Exhibit B.

1 “Asarco Houses Consent Decree” shall mean the Prospective Purchaser Consent Decree
2 entered into by EHA to resolve the liability for contamination at the Site that EHA would
3 otherwise incur by purchasing the Asarco Houses.

4 “Asarco Property” shall mean the 22 residential-zoned tracts of real property that are
5 located within the “Fenced Area,” as legally described in Exhibit A and shown in Exhibit B.

6 “Consent Decree” or “Decree” shall mean this Decree and each of the Exhibits to the
7 Decree. All exhibits are integral and enforceable parts of this Decree.

8 “Fenced Area” refers to the Former Arsenic Trioxide Processing Area as shown in
9 Figure 1-2 of the FCAP/FEIS, Exhibit C, and in Exhibit B. The Fenced Area comprises one
10 portion of the Site, and includes 22 residential-zoned tracts of real property (“Asarco Property”)
11 along with streets and other public rights of way (“Public Property”), generally located south of
12 North Broadway (SR 529), east of Hawthorne Street, west of East Marine View Drive and north
13 of Butler street, upon which the residential structures and improvements have been demolished
14 and are now surrounded by security fencing.

15 “Final Design Report” shall mean the *Final Design Report, Everett Smelter Site, 2004*,
16 attached as Exhibit G (Exhibit G also includes the Interim Action Report), and incorporated by
17 reference herein.-

18 “Integrated Final Cleanup Action Plan” and “FCAP/FEIS” shall mean the combined
19 Integrated Final Cleanup Action Plan and Final Environmental Impact Statement for the Upland
20 Area, November 19, 1999, as amended, attached as Exhibit C, and incorporated by reference
21 herein.-

22 “Interim Action Report” shall mean the *Interim Action Report, Fenced Area Cleanup,*
23 *Everett Smelter Site, 2002*, attached as Exhibit G (Exhibit G also includes the Final Design
24 Report), and incorporated by reference herein.-----

25 “Parties” refers to the Washington State Department of Ecology (“Ecology”) and the
26 Housing Authority of the City of Everett (“EHA”).

1 "Peripheral Area" shall mean that portion of the upland area of the Site, as shown in
2 Figure 1-2 of the FCAP/FEIS, Exhibit C, and in Exhibit B, which is outside of the Fenced Area.

3 "Public Property" shall mean the public streets and other public rights of way that are
4 located within the "Fenced Area," as shown in Exhibit B.

5 "Asarco Tacoma Smelter" shall mean the portion of the Commencement Bay Near
6 Shore Tideflats Superfund site which is Asarco's former Tacoma Smelter, Ruston Way and
7 North 51st Street, Tacoma, WA 98407, EPA ID WAD980726368.

8 "Section" shall mean a portion of this Decree identified by a Roman numeral and
9 including one or more paragraphs.

10 "Site" shall mean the Everett Smelter Site located in Everett, Washington. The Site is
11 defined by the extent of contamination caused by the release or threatened release of hazardous
12 substances at the Site. The Site is generally located in northeast Everett and is more particularly
13 described in Exhibit B to this Decree, which is a detailed Site diagram. The Site includes as one
14 portion the Fenced Area, and as another portion, the Asarco Houses. The Site constitutes a
15 Facility under RCW 70.105D.020(4).

16 "Successors in Interest and Assign" or "successors and assigns" shall mean any person
17 who acquires an interest in the Fenced Area subsequent to EHA acquiring an interest in the
18 Fenced Area, through purchase, lease, transfer, assignment, or otherwise.

19 V. STATEMENT OF FACTS

20 Ecology makes the following findings of fact:

21 1. The Site is located in Everett, Washington, and consists of approximately 686
22 acres. The Fenced Area constitutes a portion of the Site and approximately 5 acres. Maps of
23 the Site, which depict the extent of the Site plus relevant portions of the Site including the
24 Fenced Area, Asarco Houses, Asarco Property, and Public Property, are attached as Exhibit B.

25 2. The Everett Smelter Site previously hosted a smelter plant that, at the turn of the
26 last century, was one of the largest industrial facilities in Everett. In 1894, the Puget Sound

1 Reduction Company began operating the smelter, refining ores primarily from the Monte Cristo
2 mining district. Some of the ore from the Monte Cristo mining district contained over
3 25 percent total arsenic. To recover arsenic from the ore, an arsenic processing plant was
4 constructed on the southern end of the Everett Smelter Site. The plant consisted of several
5 structures, including additional smoke stacks, flues, ovens and mills, and a large arsenic
6 processing building.

7 3. In 1903, a corporation that subsequently became ASARCO Incorporated
8 ("Asarco") bought and continued operating the smelter. Asarco subsequently dismantled the
9 smelter in 1914 and 1915.

10 4. Asarco sold the smelter and its surrounding land-holdings through a series of
11 transactions between 1914 and 1936 to different buyers, including the Weyerhaeuser Company
12 ("Weyerhaeuser"), the State of Washington Department of Transportation, the City of Everett
13 and Burlington Northern. In addition, 17.89 acres were purchased and subsequently developed
14 into residential neighborhoods. About 25 houses were built on property that is now within the
15 Fenced Area.

16 5. During an environmental investigation in 1990, Weyerhaeuser discovered an
17 outcrop of slag discovered on the hillside below East Marine View Drive. As part of the
18 investigation, slag, soil, and ground water samples were collected on Weyerhaeuser property
19 and analyzed for the presence of heavy metals. After receiving the data, Weyerhaeuser notified
20 Ecology that a release of a hazardous substance had occurred at the Everett Smelter Site.

21 6. Ecology conducted an initial investigation of the Smelter Site in December 1990.
22 The investigation included a site visit, historic research of the area, and a review of the data
23 previously submitted by Weyerhaeuser.

24 7. Ecology conducted a Site Hazard Assessment (SHA) of the Smelter Site in
25 February 1991. The SHA consisted of a magnetic survey, to attempt to locate the extent of
26 buried slag, and collection of 20 surface soil samples that were analyzed for metals. Laboratory

1 analysis demonstrated releases of arsenic, cadmium, and lead to the soils found in the residential
2 area on the site.

3 8. Ecology conducted a "Pre-Remedial Investigation" (Pre-RI) in May 1991. The
4 Pre-RI consisted of the preparation of a site map and collection of additional soil samples. The
5 purpose of the investigation was to further characterize the nature and extent of elevated
6 concentrations of residual metals that were identified in the SHA. Results of the Pre-RI
7 confirmed releases of arsenic, cadmium, and lead in surface soils throughout the study area.

8 9. By letter dated August 29, 1991, Ecology notified Asarco of its status as a
9 "potentially liable person" under RCW 70.105D.040 after notice and opportunity for comment.

10 10. In April 1992 Ecology issued Enforcement Order No. DE92TC-N147 to Asarco.
11 This Order required Asarco to perform a Remedial Investigation/Feasibility Study and certain
12 Interim Actions to limit exposure of residents to arsenic and other metals at the Smelter Site.

13 11. In March 1994, Ecology issued the first amendment to Enforcement Order
14 No. DE92TC-N147. The first amendment required Asarco to perform additional interim actions
15 and prepare an interim deliverable remedial investigation report. The amendment also required
16 Asarco to undertake additional sampling for the remedial investigation and extended the
17 schedule.

18 12. In 1994 and 1995, Asarco voluntarily implemented a property buy-out program
19 for the homes located in the Fenced Area. All but two of the homes were purchased as part of
20 this program.

21 13. In September 1995 Ecology issued Enforcement Order No. DE95TC-N350 to
22 Asarco. This Order required Asarco to immediately take action to stop the exposure to arsenic
23 of residents, pets, and others who resided in the two remaining houses at 520 and 534 East
24 Marine View Drive, within the Fenced Area. Thereafter, Asarco purchased these properties and
25 the families vacated them.

1 14. Pursuant to Enforcement Order DE92TC-N147, Asarco prepared an Interim
2 Deliverable report in April 1994 and a Remedial Investigation and Feasibility Study (RI/FS)
3 report (*Everett Smelter Remedial Investigation and Feasibility Study, prepared by*
4 *Hydrometrics, Inc. for Asarco Inc. and dated September 1995*) for most of the study area.

5 15. Based on analytical data in the RI/FS report, there is evidence of arsenic and lead
6 in ground water and arsenic and lead in surface water on the Site. Based on other analytical
7 data collected, there is evidence of arsenic and lead in house dust on the Site.

8 16. Subsequent to issuance of Enforcement Order Nos. DE92TC-N147 and
9 DE95TC-N350 Asarco expanded its property buy-out program and purchased all but fifteen of
10 the residences in the area south of Broadway, east of Balsam Lane, north of Butler Street, and
11 west of East Marine View Drive. Since Asarco's purchase, all of the homes located within the
12 Fenced Area have been vacated and demolished. Many of the homes adjacent to the Fenced
13 Area have also been vacated, although Asarco is currently leasing some of these properties,
14 known as the Asarco Houses, for residential use.

15 17. After public notice and comment, Ecology issued the Integrated Final Cleanup
16 Action Plan and Final Environmental Impact Statement for one portion of the Everett Smelter
17 Site (FCAP/FEIS) on November 19, 1999. The FCAP/FEIS required, among other things, that
18 all material within the Fenced Area with an arsenic concentration greater than 3,000
19 milligrams/kilogram (mg/kg, equivalent to parts per million) be excavated and sent off-site to a
20 facility permitted to accept such waste. This requirement was based on concern over leaving
21 high levels of contamination in an urban neighborhood that, if exposed, could constitute an
22 immediate threat to human health.

23 18. As documented in the RI/FS and FCAP/FEIS, the remedial action to be
24 implemented pursuant to this Decree will achieve partial cleanup of the Site by achieving
25 cleanup standards for one portion of the Site, the Fenced Area. The remedial action to be
26 implemented under the FCAP/FEIS includes (1) removal of all material from the Fenced Area

1 in excess of 3,000 mg/kg of arsenic, followed by (2) removal of all material from the Fenced
2 Area between 150 and 3,000 mg/kg of arsenic and the placement of ~~two~~ a minimum of two feet
3 of clean fill, and (3) compliance monitoring activities. Because treatment, excavation, disposal,
4 and/or recycling of all hazardous substances at this portion of the Site is not practicable, the
5 remedy for the Fenced Area of the Site includes elements of on-site containment, through on-
6 site capping, as set forth in the FCAP/FEIS. The remedy therefore includes monitoring and
7 institutional controls.

8 19. In January 2000 Asarco issued the draft *Comprehensive Lowland Area*
9 *Remedial Investigation Report* (LL Report). Asarco's report concluded that it is likely that
10 remediation activities planned for the Fenced Area would be successful in intercepting and
11 removing current sources of metals to ground water and surface water. Asarco's report
12 found that the best approach for addressing elevated arsenic concentrations was to begin with
13 the Fenced Area.

14 20. On June 10, 2002, Ecology issued Enforcement Order No. 02TCPNR-4059 to
15 Asarco. Enforcement Order No. 02TCPNR-4059 required Asarco to perform an interim action
16 to remove the most contaminated material within the Fenced Area, consisting of arsenic
17 concentrations exceeding 3,000 mg/kg. Specifically, the enforcement order required Asarco to
18 excavate and send to an off-site facility all flue dust, arsenic trioxide, soil, and any other
19 material with an arsenic concentration exceeding 3,000 mg/kg.

20 21. Ecology amended Enforcement Order No. 02TCPNR-4059 in December of
21 2002, to require Asarco to include removal of material outside of the Fenced Area with arsenic
22 concentrations exceeding 3,000 mg/kg. The material outside the Fenced Area that is known to
23 have concentrations exceeding the 3,000 mg/kg limit is located along East Marine View Drive.

24 22. Enforcement Order No. 02TCPNR-4059 required Asarco to submit a work plan
25 for accomplishing the required cleanup work. Asarco submitted a draft work plan in December
26 2002. The work plan proposed accomplishing the required work in 2003 and 2004, but

1 acknowledged that delay of removal of material until 2004 would violate the Order. Asarco's
2 work plan indicated Asarco intended to send excavated material to its Asarco Tacoma Smelter,
3 but contained a contingency plan for actions to implement if the material could not be sent to
4 the Asarco Tacoma Smelter.

5 23. In a letter dated March 18, 2003, Ecology approved Asarco's December 2002
6 draft work plan.

7 24. On June 20, 2003, after correspondence established Asarco's inability to meet
8 the April 30, 2003 mobilization date stated in Enforcement Order No. 02TCPNR-4059, Ecology
9 filed suit in Snohomish County Superior Court. The suit sought injunctive relief to cause
10 Asarco to come into compliance with Enforcement Order No. 02TCPNR-4059, and adhere to
11 the schedule which had been set out in the Ecology approved December 2002 work plan.

12 25. On October 20, 2003, the Court entered an Agreed Judgment requiring Asarco to
13 come into compliance with Enforcement Order No. 02TCPNR-4059 and to comply with an
14 agreed schedule/timeline to achieve final removal of material with arsenic concentrations
15 exceeding 3,000 mg/kg by October 31, 2004 and to submit to Ecology a draft As-Built Report
16 documenting such removal by December 31, 2004.

17 26. On December 1, 2003, EHA and Asarco entered into an Option to Purchase (the
18 "Option") the Asarco Property and the Asarco Houses, with an Option term of 120 days, which
19 has been extended to 150 days.

20 27. The City of Everett has conducted land use planning under Ch. 36.70A RCW,
21 and the Site is designated 1.3, Single Family Residential, by the Everett Comprehensive Plan.
22 The Site has been used for residential purposes and is zoned R-2, single family medium density
23 residential. Any hazardous substances in soil that may remain on portions of the Fenced Area
24 after the remedial action has been completed pursuant to this Decree will not pose a threat to
25 human health and the environment. In order to enable the work in this Decree to proceed, the
26 City of Everett has agreed to take certain actions, including guaranteeing an EHA loan, granting

1 EHA powers as a community renewal agency, and abandoning certain rights of way and
2 utilities. In a letter dated May 18, 2004, which is attached as Exhibit I to this Decree and
3 incorporated herein by reference, Ecology has confirmed to the City that it does not consider the
4 City to be acquiring liability under MTCA for its role in supporting EHA's purchase and
5 cleanup of these properties.

6 28. EHA intends to facilitate the redevelopment of the Fenced Area portion of the
7 Site for single family or other residential purposes consistent with applicable City of Everett
8 comprehensive plan designations and zoning regulations as those designations may be revised.
9 EHA intends, as necessary, to seek comprehensive plan and zoning changes to permit higher
10 density residential development than may be allowed under current designations and
11 regulations.

12 VI. DESCRIPTION OF PLANNED PROJECT

13 EHA proposes to acquire the Asarco Property through purchase pursuant to a purchase
14 and sale agreement that is currently being negotiated. The sale is expected to close on or before
15 September, 2004.

16 EHA proposes to perform a partial cleanup of the Site by completing the cleanup of the
17 Fenced Area as described in this Decree, and to facilitate the redevelopment of the Fenced Area
18 for single family or other residential uses, consistent with the City of Everett's zoning and
19 comprehensive plan designations for the Site as those designations may be revised. EHA
20 expects that Asarco will utilize, inter alia, sale proceeds from EHA's purchase of the Asarco
21 Houses under a separate purchase agreement, and matching funds from an Environmental Trust
22 Fund administered by the U.S. Environmental Protection Agency, to remediate the Fenced Area
23 plus an additional adjacent area, by removing material with arsenic concentrations exceeding
24 3,000 mg/kg, in accordance with the Agreed Judgment. EHA shall then, upon purchase of the
25 Asarco Property, complete the cleanup of the Fenced Area of the Site in accordance with the
26 Scope of Work set forth herein (FCAP/FEIS, Exhibit C, and the Interim Action Report and

1 Final Design Report, Exhibit G) and with the Schedule (Exhibit F) set forth herein, including
2 but not limited to: removal of material within the Fenced Area with concentrations between 150
3 and 3,000 mg/kg, regrading of the Fenced Area, placement of a marker fabric and a minimum of
4 two feet of clean fill over contaminated soil, and implementation of required monitoring and
5 institutional controls within the Fenced Area.

6 The placement date (not to exceed June 2006) and the specifications for the minimum of
7 two feet of clean fill shall be established in the Site Restoration Plan as approved by Ecology (or
8 an Interim Site Restoration Plan, if one is prepared, as approved by Ecology). Unless otherwise
9 approved by Ecology in the Site Restoration Plan: (1) the minimum of two feet of clean fill shall
10 be topsoil that is either not contaminated with hazardous substances, or that both meets MTCA
11 unrestricted land use soil cleanup levels and constitutes "clean soil" as defined in WAC 173-
12 350-100 and is suitable to support lawns or other vegetation typical of single family residential
13 use; and (2) the cap shall be placed and hydroseeded by October 31, 2004 if possible, but in any
14 event not later than September 1, 2005. If the City of Everett has approved redevelopment
15 project plans for the Fenced Area prior to capping and the City approves of a delay, then
16 Ecology may agree to delay completion of the capping until June 2006.

17 The minimum of two feet of clean soil will be used for landscaping and other activities
18 consistent with the residential use of the Fenced Area portion of the Site. Controlled
19 disturbance or modification of the cap as required for site redevelopment activities, including
20 potential short-term exposure of soils beneath the capping layer necessary for the installation of
21 fence posts and/or modification of the cap elevations and contours, is allowable provided such
22 disturbance is performed in accordance with the Restrictive Covenants (Exhibit D).

23 The proposal will ensure the cleanup of approximately 5 acres of land and mitigate
24 existing exposure pathways at the Fenced Area.

25 Ecology has complied with the State Environmental Policy Act ("SEPA") environmental
26 review requirements for the proposed remedial actions to be performed. Ecology has been

1 established as the agency lead pursuant to SEPA. The SEPA Final Environmental Impact
2 Statement for the planned remedial actions is integrated with the Final Cleanup Action Plan
3 dated November 19, 1999, as amended (FCAP/FEIS) and is attached as Exhibit C.

4 VII. WORK TO BE PERFORMED

5 This Decree contains a program designed to protect human health and the environment
6 at the Fenced Area of the Site from the known release, or threatened release, of hazardous
7 substances or contaminants at, on, or from the sSite.

8 A. Scope of Work

9 The Scope of Work requires EHA to implement the Interim Action Report and Final
10 Design Report, Exhibit G, according to the Schedule as set forth herein and contained in Exhibit
11 F, except that EHA will not be responsible for removing the material exceeding 3000 mg/kg
12 arsenic. With respect to the compliance monitoring requirements set forth in the Compliance
13 Monitoring Plan, incorporated as Appendix A into both the Interim Action Report and the Final
14 Design Report (Exhibit G), EHA and its successors and assigns shall be responsible under this
15 Consent Decree for implementing the all requirements of the Compliance Monitoring Plan
16 applicable to soils in the Fenced Area, including but but shall not limited to soil be responsible
17 for implementing monitoring requirements at the Site outside of the Fenced Area, including
18 groundwater, surface water and storm drain sediment monitoring and (except those
19 requirements applying to soil in the peripheral area Peripheral Area and import material placed
20 in the peripheral area Peripheral Area).

21 EHA expects that prior to the Effective Date of this Decree and as a precondition to
22 EHA's purchase of the Asarco Property, Asarco will utilize, *inter alia*, sale proceeds from
23 EHA's previous purchase of the Asarco Houses and matching funds from an Environmental
24 Trust Fund administered by the U.S. Environmental Protection Agency to implement the
25 remediation specified in the Agreed Judgment, including all attachments thereto, and work
26 plans prepared thereunder, according to the schedules provided therein. Clean up activities to

1 be performed by Asarco will include removal of all material from the Site in excess of 3,000
2 mg/kg of arsenic.

3 Pursuant to this Decree, EHA shall implement a remedial action to remove all material
4 from the Fenced Area between 150 and 3,000 mg/kg of arsenic, regrade, cap, perform
5 compliance monitoring, and perform other work as required by the FCAP/FEIS, the Interim
6 Action Report and the Final Design Report, including but not limited to preparation of the
7 Landscape Buffer Plan and Final Site Restoration Plan. EHA's responsibility for remedial
8 action at the Site is confined by the terms of this Decree to the Fenced Area.-

9 The contaminated soils from the Fenced Area shall be disposed of at the Asarco Tacoma
10 Smelter. EHA may request an extension of schedule based upon good cause, pursuant to
11 Section XXIV (Extension of Schedule), if the Asarco Tacoma Smelter becomes unavailable for
12 disposal of materials from the Fenced Area as required by this Decree. Coordination of cleanup
13 and development will minimize disruption to the surrounding community. Ecology has
14 reviewed and approved the proposed methods for transportation and disposal as described in the
15 Final Design Report.

16 EHA shall provide security at the Fenced Area designed to prevent ~~entry by exposure of~~
17 unauthorized persons to contaminated soils. Security measures shall be maintained during the
18 implementation of the remediation activities required by ~~duration of~~ this Decree, unless
19 otherwise agreed to by Ecology.

20 Completion of remediation for any parcel may be certified by Ecology after receipt of all
21 validated performance monitoring data and pursuant to Section XXVII (Certifications by
22 Ecology).

23 Because residual concentrations of hazardous substances in groundwater at the Site will
24 exceed cleanup levels following completion of the remedial action, and because residual
25 concentrations of hazardous substances in soils at certain parcels of the Fenced Area may
26 exceed cleanup levels following completion of the remedial action, EHA shall either: (1) record

1 Restrictive Covenant 1 shown in Exhibit D for parcels on which soil contamination remains or
2 (2) record Restrictive Covenant 2 shown in Exhibit D for parcels where no soil contamination
3 remains. EHA must seek Ecology's prior written approval before filing a Restrictive Covenant
4 for any parcel within ten (10) days of the completion of the remedial action for that parcel or for
5 the Fenced Area as a whole. EHA shall then file the Restrictive Covenant with the Snohomish
6 County Auditor's Office within ten (10) days of receiving Ecology's written approval, and shall
7 then provide Ecology with a copy of each recorded Restrictive Covenant within thirty (30) days
8 of the recording date. If associated replatting of any such parcels will occur within an expected
9 timeframe and no activities conducted at the parcels in question will threaten the integrity of the
10 remedial action or the continued protection of human health and the environment in the interim,
11 EHA may extend the timeline for seeking Ecology's written approval of the Restrictive
12 Covenant for the parcel in question to within ten (10) days of any associated replatting, and the
13 timeline for filing such Restrictive Covenant will be extended to within ten (10) days of EHA's
14 receipt of Ecology's written approval. If at any point in the future the conditions requiring a
15 restrictive covenant for any parcel under this Section no longer exist, then EHA, or its
16 Successors in Interest and Assigns, may submit a request to Ecology that the restrictive
17 covenant be eliminated. The restrictive covenant shall be removed, if Ecology, after public
18 notice and opportunity to comment, concurs.

19
20 B. Schedule for Work

21 The Schedule for Work is set forth in Exhibit F.

22 C. EHA agrees not to perform any remedial actions outside the scope of this Decree
23 unless approved in writing by Ecology. All work conducted by EHA under this Decree shall be
24 done in accordance with Chapter 173-340 WAC unless otherwise provided herein.

VIII. ECOLOGY COSTS

EHA agrees to pay costs incurred by Ecology pursuant to this Decree and consistent with WAC 173-340-550(2). These costs shall include work performed by Ecology or its contractors for, or on, the Fenced Area of the Site under Ch. 70.105D RCW both prior to and subsequent to the issuance of this Decree for investigations, remedial actions, and Decree preparation, negotiations, oversight, and administration relating to work that is required by this Decree. Ecology costs shall include costs of direct activities and the support costs of direct activities as defined in WAC 173-340-550(2). EHA agrees to pay the required amount within ninety (90) days of receiving from Ecology an itemized statement of costs that includes a summary of costs incurred, an identification of involved staff, and the amount of time spent by involved staff members on the project, unless Ecology agrees in writing and in advance to an extended schedule for payment. A general statement of work performed will be provided upon request. Itemized statements shall be prepared quarterly. Failure to pay Ecology's costs within ninety (90) days of receipt of the itemized statement will result in interest charges pursuant to WAC 173-340-550(4), unless Ecology agrees in writing and in advance to an extended payment schedule.

IX. GRANT FUNDING

Pursuant to RCW 70.105D.070(3)(a) and Chapter 173-322 WAC, Ecology has made the following determinations: (a) EHA is a local government required, pursuant to this Decree, to undertake remedial action at the Site; and (b) EHA is prepared to proceed promptly to accomplish the remediation set forth in Section VII (Work to Be Performed) and expenses incurred in implementing the work to be performed, hereunder are eligible for a local government grant; and (c) implementation of this Decree will lead to a more expeditious cleanup of hazardous substances at the Site in compliance with cleanup standards adopted under RCW 70.105D.030(2)(e).

1 **X. DESIGNATED PROJECT COORDINATORS**

2 The project coordinator for Ecology is:

3 David L. South
4 Department of Ecology
5 3190 160th Avenue SE
6 Bellevue, WA 98008
7 Telephone: (425-649-7200)

8 The project coordinator for EHA is:

9 Mr. Bud Alkire
10 Executive Director
11 The Housing Authority of the City of Everett
12 P.O. Box 1547, Everett, WA 98206-1547
13 Telephone: (425) 303-1102

14 Each project coordinator shall be responsible for overseeing the implementation of this
15 Decree. The Ecology project coordinator will be Ecology's designated representative at the
16 Site. To the maximum extent possible, communications between Ecology and EHA, and all
17 documents, including reports, approvals, and other correspondence concerning the activities
18 performed pursuant to the terms and conditions of this Decree shall be directed through the
19 project coordinators. The project coordinators may designate, in writing, working-level staff
20 contacts for all or portions of the implementation of the work required by this Decree. The
21 project coordinators may agree to minor changes to the work to be performed without formal
22 amendments to this Decree. Minor changes will be documented in writing by Ecology.
23 Substantial changes shall require amendment of this Consent Decree.

24 Any party may change its respective project coordinator. Written notification shall be
25 given to the other party at least ten (10) calendar days prior to the change.

26 **XI. PERFORMANCE**

 All work performed pursuant to this Decree shall be under the direction and supervision,
 as necessary, of a professional engineer or hydrogeologist, or equivalent, with experience and
 expertise in hazardous waste site investigation and cleanup. All construction and engineering

1 work performed pursuant to this Decree must be under the supervision of a professional
2 engineer. EHA shall notify Ecology in writing of the identity of such engineer(s) or
3 hydrogeologist(s), or others, and of any contractors and subcontractors to be used in carrying
4 out the terms of this Decree, in advance of their involvement at the Site.

5 **XII. CERTIFICATION OF EHA**

6 EHA represents and certifies that, to the best of its knowledge and belief, it has fully and
7 accurately disclosed to Ecology the information currently in its possession or control that relates
8 to the environmental conditions at and in the vicinity of the Site, or to EHA's right and title
9 thereto.

10 EHA represents and certifies that it did not cause or contribute to a release or threatened
11 release of hazardous substances at the Site and is not otherwise potentially liable under RCW
12 70.105D.040(1), pursuant to paragraph D of Section II (Jurisdiction), except as provided in the
13 Asarco Houses Decree, and except by becoming an owner and/or operator of the Site by
14 acquiring an interest in the Fenced Area.

15 **XIII. TRANSFER OF INTEREST IN PROPERTY**

16 No voluntary conveyance or relinquishment of title, easement, leasehold, or other
17 interest in any portion of the Fenced Area of the Site shall be consummated by EHA without
18 provision for continued operation and maintenance of any containment system, treatment
19 system, and/or monitoring system installed or implemented pursuant to this Decree.

20 Prior to EHA's transfer of any interest in all or any portion of Fenced Area of the Site,
21 and during the effective period of this Decree, EHA shall serve a copy of this Decree upon any
22 prospective purchaser, lessee, transferee, assignee, or other successor in said interest; and, at
23 least thirty (30) days prior to any transfer, EHA shall notify Ecology of said transfer. Upon
24 transfer of any interest, EHA shall restrict uses and activities to those consistent with this
25 Consent Decree and notify the transferee(s) of the restrictions on the use of the property.
26

1 **XIV. AMENDMENT OF CONSENT DECREE**

2 This Decree may only be amended by a written stipulation among the Parties that is
3 entered by the Court, or by order of the Court. Such amendment shall become effective upon
4 entry by the Court. Agreement to amend the Decree shall not be unreasonably withheld by any
5 Party.

6 EHA shall submit any request for an amendment to Ecology for approval. Ecology shall
7 indicate its approval or disapproval in a timely manner after the request for amendment is
8 received. If the amendment to the Decree represents a substantial change, Ecology will provide
9 public notice and opportunity for comment. Reasons for the disapproval of a proposed
10 amendment to the Decree shall be stated in writing. If Ecology does not agree to any proposed
11 amendment, the disagreement may be addressed through the dispute resolution procedures
12 described in Section XV (Dispute Resolution).

13 **XV. DISPUTE RESOLUTION**

14 A. In the event a dispute arises as to any approval, disapproval, proposed change, or
15 other decision or action by Ecology's project coordinator, the Parties shall use the dispute
16 resolution procedure set forth below.

17 (1) Upon receipt of the Ecology project coordinator's decision, EHA shall
18 have fourteen (14) days to notify Ecology's project coordinator of any objection to the decision.

19 (2) The Parties' project coordinators shall then confer in an effort to resolve
20 the dispute. If the project coordinators cannot resolve the dispute within fourteen (14) days,
21 Ecology's project coordinator shall issue a written decision.

22 (3) EHA may then request Ecology management review of the decision.
23 This request shall be submitted in writing to the Toxics Cleanup Program Manager within seven
24 (7) days of receipt of Ecology's project coordinator's written decision.

25 (4) Ecology's Toxics Cleanup Program Manager shall conduct a review of
26 the dispute and shall issue a written decision regarding the dispute within thirty (30) days of the

1 request for review by EHA. The Toxics Cleanup Program Manager's decision shall be
2 Ecology's final decision on the disputed matter.

3 B. If Ecology's final written decision is unacceptable to EHA, EHA has the right to
4 submit the dispute to the Court for resolution. The Parties agree that one judge should retain
5 jurisdiction over this case and shall, as necessary, resolve any dispute arising under this Decree.
6 In the event EHA presents an issue to the Court for review, the Court shall review the action or
7 decision of Ecology on the basis of whether such action or decision was arbitrary and capricious
8 and render a decision based on such standard of review.

9 C. The Parties agree to only utilize the dispute resolution process in good faith and
10 to expedite, to the extent possible, the dispute resolution process whenever it is used. When
11 either party uses the dispute resolution in bad faith or for purposes of delay, the other party may
12 seek sanctions.

13 Implementation of these dispute resolution procedures shall not provide a basis for delay
14 of any activities required in this Decree, unless Ecology agrees in writing to a schedule
15 extension or the Court so orders.

16 XVI. CONTRIBUTION PROTECTION

17 With regard to claims for contribution against EHA, the Parties agree that EHA is
18 entitled to protection against claims for contribution for matters addressed in this Decree as
19 provided by RCW 70.105D.040(4)(d).

20 For the purposes of this Section, "matters addressed" include all remedial actions taken
21 or to be taken and all remedial action costs (including Ecology's oversight costs) incurred or to
22 be incurred by Ecology or any other person with respect to the Site. This Contribution
23 Protection does not protect EHA against claims for contribution or recovery of remedial action
24 costs taken or to be taken by Ecology or any other person with respect to the Site, in the event
25
26

1 EHA incurs liability for the Site by acquiring any interest in the Site other than the Fenced Area
2 as contemplated by this Decree, and EHA does not resolve such potential liability for the Site
3 through a separate, valid consent decree.

4 **XVII. COVENANT NOT TO SUE; REOPENERS**

5 A. Covenant Not to Sue: In consideration of EHA's compliance with the terms and
6 conditions of this Decree, Ecology covenants not to institute legal or administrative actions
7 against EHA regarding the release or threatened release of hazardous substances at the Site
8 covered by this Decree.
9

10 This Decree covers only the Everett Smelter Site, specifically identified in Exhibit B and
11 those hazardous substances that Ecology knows are located at the Site as of the date of entry of
12 this Decree. This Decree does not cover any other hazardous substance or area. Ecology
13 retains all of its authority relative to any substance or area not covered by this Decree. In
14 addition, this Covenant Not to Sue does not provide EHA protection from legal or
15 administrative actions against EHA for the release or threatened release at the Site, in the event
16 EHA incurs liability for the Site by acquiring any separate interest in the Site (other than the
17 Fenced Area, as contemplated by this Decree), and EHA does not resolve such liability for the
18 Site through a separate, valid consent decree.
19

20 This Covenant Not To Sue shall have no applicability whatsoever to:

- 21 (1) Criminal liability;
22 (2) Liability for damages to natural resources;
23 (3) Any Ecology action, including cost recovery, against potentially liable persons
24 not a party to this Decree.
25
26

1 If factors not known to Ecology at the time of entry of the settlement agreement are
2 discovered and present a previously unknown threat to human health or the environment, and
3 Ecology determines in light of this information that further remedial action is necessary at the
4 Fenced Area of the Site to protect human health or the environment, the Court shall amend this
5 covenant not to sue.

6
7 B. Reopeners: Ecology specifically reserves the right to institute legal or
8 administrative action against EHA to require it to perform additional remedial actions at the
9 Fenced Area of the Site and to pursue appropriate cost recovery, pursuant to RCW 70.105D.050
10 under the following circumstances:

11
12 (1) Upon EHA's failure to meet the requirements of this Decree, including but not
13 limited to, failure of the remedial action to meet the cleanup standards identified in the
14 FCAP/FEIS (Exhibit C); or

15 (2) Upon Ecology's determination that action beyond the terms of this Decree is
16 necessary to abate an imminent and substantial endangerment to human health or the
17 environment; or

18 (3) Upon the availability of new information regarding factors previously unknown
19 to Ecology, including the nature or quantity or hazardous substances at the Site, and Ecology
20 determines, in light of this information, that further remedial action is necessary at the Fenced
21 Area of the Site to protect human health or the environment; or

22 (4) Upon Ecology's determination that additional remedial actions are necessary to
23 achieve cleanup standards for the Fenced Area of the Site within the reasonable restoration time
24 frame set forth in the FCAP/FEIS.

1 C. Except in the case of an emergency, prior to instituting legal or administrative
2 action against EHA pursuant to paragraph B. above, Ecology shall provide EHA with fifteen
3 (15) calendar days notice of such action.

4 XVIII. DISCLAIMER

5 This Decree does not constitute a representation by Ecology that the Site is fit for any
6 particular purpose.

7 XIX. RETENTION OF RECORDS

8 During the pendency of this Decree and for ten (10) years from the date this Decree is no
9 longer in effect as provided in Section XXVII (Duration of Decree), EHA shall preserve all
10 records reports, documents, and underlying data in its possession relevant to the implementation
11 of this Decree and shall insert a similar record retention requirement into all contracts with
12 project contractors and subcontractors. Upon request of Ecology, EHA shall make all records
13 available to Ecology and allow access for review within a reasonable period of time.

14 XX. ACCESS

15 Ecology or any Ecology authorized representative shall have full authority to enter and
16 freely move about all property at the Site that EHA either owns, controls, or has access rights to
17 at all reasonable times for the purposes of, *inter alia*: inspecting records, operation logs, and
18 contracts related to the work being performed pursuant to this Decree; reviewing EHA's
19 progress in carrying out the terms of this Decree; conducting such tests or collecting such
20 samples as Ecology may deem necessary; using a camera, sound recording, or other
21 documentary type equipment to record work done pursuant to this Decree; and verifying the
22 data submitted to Ecology by EHA. EHA shall make all reasonable efforts to secure access
23 rights for those properties within the Site not owned or controlled by Defendant where remedial
24 activities or investigations will be performed pursuant to this Decree. Ecology or any
25 authorized representative shall give reasonable notice before entering any Site property owned
26

1 or controlled by EHA unless an emergency prevents such notice. All Parties who access the
2 Site pursuant to this paragraph shall comply with the approved Health and Safety Plan in the
3 Final Design Report, Exhibit G.

4 **XXI. COMPLIANCE WITH OTHER APPLICABLE LAWS**

5 A. All actions carried out by EHA pursuant to this Decree shall be done in
6 accordance with all applicable federal, state, and local requirements, including requirements to
7 obtain necessary permits, except as provided in paragraph B of this Section.

8 B. Pursuant to RCW 70.105D.090(1), the substantive requirements of Chapters
9 70.94, 70.95, 70.105, 75.55, 90.48, and 90.58 RCW and of any laws requiring or authorizing
10 local government permits or approvals for remedial action under this Decree that are known to
11 be applicable at the time of entry of the Decree have been included in the FCAP/FEIS (Exhibit
12 C), and/or the Interim Action Report and/or Final Design Report (Exhibit G), and are binding
13 and enforceable requirements of the Decree.

14 EHA has a continuing obligation to determine whether additional permits or approvals
15 addressed in RCW 70.105D.090(1) would otherwise be required for the remedial action under
16 this Decree. In the event either EHA or Ecology determines that additional permits or approvals
17 addressed in RCW 70.105D.090(1) would otherwise be required for the remedial action under
18 this Decree, it shall promptly notify the other party of this determination. Ecology shall
19 determine whether Ecology or EHA shall be responsible to contact the appropriate state and/or
20 local agencies. If Ecology so requires, EHA shall promptly consult with the appropriate state
21 and/or local agencies and provide Ecology with written documentation from those agencies of
22 the substantive requirements those agencies believe are applicable to the remedial action.
23 Ecology shall make the final determination on the additional substantive requirements that must
24 be met by EHA and on how EHA must meet those requirements. Ecology shall inform EHA in
25 writing of these requirements and EHA shall have the opportunity to comment on such
26 requirements. Once established by Ecology, the additional requirements shall be enforceable

1 requirements of this Decree. EHA shall not begin or continue the remedial action potentially
2 subject to the additional requirements until Ecology makes its final determination.

3 Ecology shall ensure that notice and opportunity for comment is provided to the public
4 and appropriate agencies prior to establishing the substantive requirements under this Section.

5 C. Pursuant to RCW 70.105D.090(2), in the event that Ecology determines that the
6 exemption from complying with the procedural requirements of the laws referenced in RCW
7 70.105D.090(1) would result in the loss of approval from a federal agency necessary for the
8 state to administer any federal law, such exemption shall not apply and EHA shall comply with
9 both the procedural and substantive requirements of the laws referenced in RCW
10 70.105D.090(1), including any requirements to obtain permits.

11 **XXII. SAMPLING, DATA REPORTING, AND AVAILABILITY**

12 With respect to the implementation of this Decree, EHA shall make the results of all
13 sampling, laboratory reports, and/or test results generated by it, or on its behalf available to
14 Ecology and shall submit these results in accordance with Section XXIII (Progress Reports).

15 Ground water sampling shall be submitted to Ecology according to the requirements of
16 WAC 173-340-840(5). These submittals shall be provided to Ecology in accordance with
17 Section XXIII (Progress Reports). Such groundwater sampling will be submitted to Ecology in
18 conjunction with the as built reports required by WAC 173-340-400(6)(b)(ii).

19 If requested by Ecology, EHA shall allow split or duplicate samples to be taken by
20 Ecology and/or its authorized representative of any samples collected by EHA pursuant to the
21 implementation of this Decree. EHA shall notify Ecology at least seven (7) working days in
22 advance of any sample collection or work activity at the Site. Ecology shall, upon request,
23 allow split or duplicate samples to be taken by EHA or its authorized representative, of any
24 samples collected by Ecology pursuant to the implementation of this Decree, provided it does
25 not interfere with the Ecology's sampling. Without limiting Ecology's rights under Section XX
26

1 (Access), Ecology shall endeavor to notify EHA at least five (5) working days prior to any
2 sampling collection activity.

3 **XXIII. PROGRESS REPORTS**

4 EHA shall submit to Ecology written monthly progress reports that describe the actions
5 taken during the previous month to implement the requirements of this Decree. The progress
6 report shall include the following:

7 A. A list of activities that have taken place at the Fenced Area pursuant to
8 the terms of this Decree during the month;

9 B. Detailed description of any deviations from required tasks not otherwise
10 documented in project plans or amendment requests;

11 C. Description of all deviations from the Schedule (Exhibit F) during the
12 current month and any planned deviations in the upcoming month;

13 D. For any deviations in schedule, a plan for recovering lost time and
14 maintaining compliance with the schedule;

15 E. All raw data (including laboratory analyses) received by EHA during the
16 past month and an identification of the source of the sample; and

17 F. A list of deliverables for the upcoming reporting period if different from
18 the Schedule.

19 EHA may substitute project reports submitted by Asarco or EHA's agents, contractors or
20 subcontractors for any EHA progress reports required under this Section, provided such reports
21 meet the above requirements. All Progress Reports shall be submitted by the tenth (10) day of
22 the month in which they are due after the Effective Date of this Decree. Unless otherwise
23 specified, Progress Reports and any other documents submitted pursuant to this Decree shall be
24 sent by hard copy and electronic copy to Ecology's project coordinator.

XXIV. EXTENSION OF SCHEDULE

A. An extension of schedule shall be granted only when a request for an extension is submitted in a timely fashion, generally at least thirty (30) days prior to expiration of the deadline for which the extension is requested, and good cause exists for granting the extension. All extensions shall be requested in writing. The request shall specify the reason(s) the extension is needed.

An extension shall only be granted for such period of time as Ecology determines is reasonable under the circumstances. Ecology may grant schedule extensions exceeding ninety (90) days only as a result of:

(1) Delays in the issuance of a necessary permit which was applied for in a timely manner; or

(2) Other circumstances deemed exceptional or extraordinary by Ecology; or

(3) Endangerment as described in Section XXV.

A requested extension shall not be effective until approved by Ecology or, if required, by the Court. Ecology shall act upon any written request for extension in a timely fashion. Ecology shall give EHA written notification in a timely fashion of any extensions granted pursuant to this Decree. Unless the extension is a substantial change, it shall not be necessary to amend the Decree pursuant to Section XIV (Amendment of Consent Decree) when a schedule extension is granted.

B. The burden shall be on EHA to demonstrate to the satisfaction of Ecology that the request for such extension has been submitted in a timely fashion and that good cause exists for granting the extension. Good cause includes, but is not limited to:

(1) Circumstances beyond the reasonable control and despite the due diligence of EHA, including delays caused by unrelated third parties or Ecology, such as (but not limited to) delays by Ecology in reviewing, approving, or modifying documents submitted by EHA; or

1 (2) The unavailability of the Asarco Tacoma Smelter for disposal of the materials to
2 be removed under this Decree; or

3 (3) Acts of God, including fire, flood, blizzard, extreme temperatures, storm, or
4 other unavoidable casualty; or

5 (4) Endangerment as described in Section XXV.

6 However, neither increased costs of performance of the terms of the Decree nor changed
7 economic circumstances shall be considered circumstances beyond the reasonable control of
8 EHA.

9 XXV. ENDANGERMENT

10 If, for any reason, Ecology determines that any activity being performed at the Site
11 pursuant to this Decree is creating or has the potential to create a danger to human health or the
12 environment, Ecology may direct EHA to cease such activities for such period of time as it
13 deems necessary to abate the danger. EHA shall immediately comply with such direction.

14 If, for any reason, EHA determines that any activity being performed at the Site pursuant
15 to this Decree is creating or has the potential to create a danger to human health or the
16 environment, EHA may cease such activities. EHA shall notify Ecology's project coordinator
17 as soon as possible, but no later than twenty-four (24) hours after making such determination or
18 ceasing such activities. Upon Ecology's direction, EHA shall provide Ecology with
19 documentation of the basis for the determination or cessation of such activities. If Ecology
20 disagrees with EHA's cessation of activities, it may direct EHA to resume such activities.

21 If Ecology concurs with or directs a work stoppage pursuant to this Section, EHA's
22 obligations with respect to the ceased activities shall be suspended until Ecology determines the
23 danger is abated, and the time for performance of such activities, as well as the time for any
24 other work dependent upon such activities, shall be extended, in accordance with Section XXIV
25 (Extension of Schedule), for such period of time as Ecology determines is reasonable under the
26 circumstances.

1 Nothing in this Order shall limit the authority of Ecology, its employees, agents, or
2 contractors to take or require appropriate action in the event of an emergency.

3 **XXVI. PUBLIC PARTICIPATION**

4 The Public Participation Plan for the remediation of the Fenced Area of the Site pursuant
5 to the terms of this Decree, is attached as Exhibit E. Ecology shall maintain the responsibility
6 for public participation at the Site. However, EHA shall cooperate with Ecology, and shall:

7 A. If agreed to by Ecology, prepare drafts of public notices and fact sheets at
8 important stages of the remedial action, such as the submission of work plans, Remedial
9 Investigation/Feasibility Study reports and engineering design reports. As appropriate, Ecology
10 will edit, finalize, and distribute such fact sheets and prepare and distribute public notices of
11 Ecology's presentations and meetings;

12 B. Notify Ecology's project coordinator prior to the preparation of all press releases
13 and fact sheets, and before meetings with the interested public and local governments. Likewise,
14 Ecology shall notify EHA prior to the issuance of all press releases and fact sheets, and before
15 meetings with the interested public and local governments. For all press releases, fact sheets,
16 meetings, and other outreach efforts by EHA that do not receive prior Ecology approval, EHA
17 shall clearly indicate to its audience that the press release, fact sheet, meeting, or other outreach
18 effort was not sponsored or endorsed by Ecology;

19 C. If agreed to by Ecology, participate in public presentations on the progress of the
20 remedial action at the Site. Participation may be through attendance at public meetings to assist in
21 answering questions, or as a presenter;

22 D. In cooperation with Ecology, assist in maintaining information repositories to be
23 located at the following locations:

24
25 **Department of Ecology**
Northwest Regional Office, Central Files
3190 160th Avenue SE
26 Bellevue, WA

425-649-7190

Everett Public Library

2702 Hoyt Avenue

Everett, WA 98201

425-257-8000

At a minimum, copies of all public notices, fact sheets, and press releases; all quality assured ground water, surface water, soil sediment, and air monitoring data; remedial actions plans, supplemental remedial planning documents, and all other similar documents relating to performance of the remedial action required by this Decree shall be promptly placed in the Northwest Regional Office repository.

**XXVII. DURATION OF DECREE AND RETENTION OF JURISDICTION;
CERTIFICATIONS BY ECOLOGY**

This remedial program described in the Decree shall be maintained and continued until EHA has received written notification by Ecology that the requirements of this Decree have been satisfactorily completed. This Decree shall remain in effect until dismissed by the Court. When dismissed, Section XVII (Covenant Not to Sue) and Section XVI (Contribution Protection) of this Decree, shall survive.

In order to facilitate the timely redevelopment of the Fenced Area, upon completion and confirmation of the remediation activities specified in the Scope of Work herein (the FCAP/FEIS, the Interim Action Report and the Final Design Report), Ecology may issue a Partial Certificate of Completion where appropriate on a parcel by parcel basis, after consulting with the City of Everett and after City of Everett approval of the Final Site Restoration Plan and work completed under that plan for any parcel in question, noting that redevelopment may proceed based only upon the implementation of any required institutional controls, including Restrictive Covenants that are made applicable to any parcel in question under the terms of this Decree. In the alternative, upon completion and confirmation of the remediation activities specified in the Scope of Work herein (the FCAP/FEIS, the Interim Action Report and the Final

1 Design Report), after consultation with the City of Everett, and upon implementation of
2 institutional controls and City of Everett approval of the ~~planned project and any associated~~
3 ~~replatting~~ Final Site Restoration Plan and work completed under that plan, Ecology will issue a
4 Certificate of Completion. ~~Unless Ecology becomes aware of any circumstances at the Site that~~
5 ~~present a previously unknown threat to human health or the environment, Ecology shall, within~~
6 ~~thirty (30) days of issuance of the Certificate of Completion, propose to remove the Site from~~
7 ~~the Hazard Sites List, pursuant to WAC 173-340-330(7).~~

8 **XXVIII. WITHDRAWAL OF CONSENT**

9 If the Court withdraws its consent, this Decree shall be null and void at the option of any
10 party and the accompanying complaint shall be dismissed without costs and without prejudice.
11 In such an event, no party shall be bound by the requirements of this Decree. This Section shall
12 not create a basis for withdrawal of consent or termination of this Decree other than those
13 created by the terms of this Decree or that exist by operation of law or equity.

14 **XXIX. IMPLEMENTATION OF REMEDIAL ACTION**

15 If Ecology determines that EHA has failed without good cause to implement the remedial
16 action, in whole or in part, Ecology may, after notice to EHA, perform any or all portions of the
17 remedial action that remain incomplete. If Ecology performs all or portions of the remedial action
18 because of the EHA's failure to comply with its obligations under this Decree, EHA shall
19 reimburse Ecology for the costs of doing such work in accordance with Section VIII (Ecology
20 Costs), provided that EHA is not obligated under this Section to reimburse Ecology for costs
21 incurred for work inconsistent with or beyond the scope of this Decree.

22 **XXX. INDEMNIFICATION**

23 EHA agrees to indemnify and save and hold the State of Washington, its employees, and
24 agents harmless from any and all claims or causes of action for death or injuries to persons or
25 for loss or damage to property arising from or on account of acts or omissions of EHA, its
26 officers, employees, agents, or contractors in entering into and implementing this Decree.

1 However, EHA shall not indemnify the State of Washington nor save nor hold its employees
2 and agents harmless from any claims or causes of action arising out of the negligent acts or
3 omissions of the State of Washington, or employees or agents of the State in implementing the
4 activities pursuant to this Decree.

5 **XXXI. CLAIMS AGAINST THE STATE**

6 EHA hereby agrees that it will not seek to recover any costs accrued in implementing the
7 remedial action required by this Decree from the State of Washington or any of its agencies.
8 This Section does not limit EHA from applying for grant funding from the Local Toxics Control
9 Account for a portion of the costs incurred in implementing this Decree. Except as provided
10 above, however, EHA expressly reserves its right to seek to recover any costs incurred in
11 implementing this Decree from any other PLP.

12 **XXXII. SEVERABILITY**

13 If any section, subsection, sentence or clause of this Decree is found to be illegal, invalid
14 or unenforceable, such illegality, invalidity or unenforceability will not affect the illegality or
15 enforceability of this Decree as a whole or of any other section, subsection, sentence or clause.

16 **XXXIII. EFFECTIVE DATE**

17 The Effective Date of this Decree is the final date when both the Decree is entered by
18 the Court and title to the Asarco Property vests in EHA. If EHA does not take title to the
19 Asarco Property, this Decree shall be void.

20 The undersigned Parties enter into this Prospective Purchaser Consent Decree on the
21 date specified below.
22

23 STATE OF WASHINGTON
24 DEPARTMENT OF ECOLOGY

CHRISTINE O. GREGOIRE
Attorney General

25
26 James J. Pendowski
Program Manager

Kristie E. Carevich, WSBA No. 28018
Assistant Attorney General

1 Toxics Cleanup Program

2 Date: _____

Date: _____

3
4
5 HOUSING AUTHORITY OF THE CITY OF EVERETT

6
7 _____
S. Bud Alkire
Executive Director

8 Date: _____
9

10 ENTERED this _____ day of _____, 2004.
11

12 _____
JUDGE
Snohomish County Superior Court
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